

Editor's Note: Reconsideration denied by order dated May 18, 1999; appeal
filed Civ. No. 99-90J (W.D. Pa. May 6, 1999)

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

v.

THOMPSON BROTHERS COAL COMPANY ET AL.

IBLA 97-523

Decided April 7, 1999

Appeal from a decision of Administrative Law Judge David Torbett
vacating notice of violation and cessation order. CH 97-3-R, CH 97-4-R, CH
97-5-R.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977:
Administrative Procedure: Generally--Surface Mining
Control and Reclamation Act of 1977: Appeals:
Generally--Surface Mining Control and Reclamation Act
of 1977: Hearings: Procedure

Under the expedited review procedures provided by 43
C.F.R. ' 4.1187(f), so long as the intention to appeal
a decision of an administrative law judge is clearly
stated on the record, a request to certify the record
to the Board will be presumed to have been made as a
matter of law, absent an unequivocal statement to the
contrary by the moving party.

2. Administrative Practice--State Laws--Surface Mining
Control and Reclamation Act of 1977: State Program:
Generally--Surface Mining Control and Reclamation Act
of 1977: State Regulation: Generally

Where the proper interpretation of a state statute or
regulation is at issue, the Board will defer to the
interpretation adopted by state officials or state
agencies charged with the administration of the
programs involved, in the absence of any contrary state
court decisions adjudicating the question.

3. Surface Mining Control and Reclamation Act of 1977:
State Program: Generally--Surface Mining Control and
Reclamation Act of 1977: State Regulation: Generally

Under the provisions of section 315 of the Commonwealth of Pennsylvania Clean Streams Law, 35 Pa. Cons. Stat. ' 691.315 (1998), if an acid mine discharge is located within a mine operator's permit, neither fault nor causation is necessary to impose liability on the mine operator.

APPEARANCES: Alan F. Kirk, Esq., Clearfield, Pennsylvania, for Thompson Brothers Coal Company and Al Hamilton Contracting Company; Wayne A. Babcock, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from a decision of Administrative Law Judge David Torbett, issued orally on May 7, 1997, following completion of a 3-day hearing, vacating Notice of Violation (NOV) No. 97-121-377-01 and Cessation Order (CO) No. 97-121-377-01 issued to Thompson Brothers Coal Company (Thompson), as the permittee, and Al Hamilton Contracting Company (Hamilton), as operator, based on an alleged acid mine drainage emanating from the Morris No. 2 mine located on SMP 17810104. For the reasons set forth below, we reverse.

Initially, we note that the substantive issues 1/ raised by this appeal revolve around acid mine drainage occurring at a site identified as Monitoring Point (MP) #11. That an acid discharge is occurring at that site now and has occurred there for a considerable time in the past is undisputed. What is in dispute is whether MP #11 is located within the exterior limits of permit SMP 17810104 and whether the acid drainage occurring is hydrogeologically connected to the operations being conducted at the Morris No. 2 mine.

The genesis of the instant controversy began in the course of a study being conducted by OSM personnel in October 1994, concerning the practices of the Pennsylvania Department of Environmental Resources (PADER) as they related to bond release and acid mine drainage problems under the approved Pennsylvania program. After a review of relevant PADER records disclosed that a bond release sought by Thompson had been denied due to acid mine discharge at MP #11, OSM inspector Isaac E. Isaacson conducted an on-site inspection, accompanied by PADER inspector Owen Biesinger.

According to Isaacson, the permit maps indicated that the permit embraced an area bounded by township road T-680 on the north and township road T-678 on the east. The permit boundary then proceeded in a generally

1/ There is also a procedural issue dealt with infra.

northwesterly direction along the Ralph H. Thompson property line and then jogged north along township road T-675 to its intersection with township road T-805 at which point the permit boundary followed T-805 in a westerly direction. Isaacson located the point of discharge at MP #11 as immediately north of T-805 and within the confines of the permit. (I Tr. 55.) 2/ While mining was being conducted on the permit at that time, it was not being conducted in the immediate vicinity of MP #11 nor had the area around MP #11 been previously mined under SMP 17810104. (I Tr. 55-56.)

Isaacson noted that the discharge occurred from a seep zone at MP #11 into a drainage ditch along T-805 and then proceeded under the road through a culvert at the rate of approximately 40 to 50 gallons per minute. He took a sample of the discharge and, when subsequent analysis of the sample showed that the water failed to meet applicable effluent limits for pH, acidity, iron, and manganese, he concluded that a violation of the commonwealth program existed. (I Tr. 57, 67.) When efforts to get the commonwealth authorities to issue a violation were unsuccessful, Isaacson recommended issuance of a 10-day notice (TDN) to the appropriate commonwealth officials. On November 7, 1994, a TDN was issued by OSM's Harrisburg Field Office (HFO). See Respondent's Ex. 5.

On November 15, 1994, Michael W. Smith, PADER's Hawk Run District Mining Manager, responded to the TDN, noting that the discharge was under hydrogeologic investigation by PADER and requesting a 6-month period to complete its investigation. This request was granted. A subsequent request for an additional 6 months was also granted, as was a further request for an extension of time until December 1, 1995, to allow the Pennsylvania Department of Environmental Protection (PADEP) 3/ to finalize its report, complete a legal review, and determine its future course of action. See Respondent's Exs. 6, 7, 8, 9, 10, 11, and 13.

A Preliminary Hydrologic Review was completed by PADEP on July 21, 1995. This report concluded that MP #11 was hydrologically linked to the areas affected by the Morris No. 2 surface mining operation. See Respondent's Ex. 12 at 3. A final report, entitled Completion Report Review, was issued on December 19, 1995. See Respondent's Ex. 14. This final report reaffirmed the conclusion of the preliminary report that the acid discharge at MP #11 was hydrologically connected to the surface mining activities being conducted at the Morris No. 2 mine. Id.

Following finalization of the report, discussions ensued between PADEP and OSM personnel as to what actions would be taken next. Thompson

2/ Since the transcript for each day's hearing was individually numbered, citations to the transcript will be preceded by roman numerals to denote the day of the transcript followed by the page citation. Thus, "I Tr. 55" is the first day's transcript at page 55.

3/ The Pennsylvania Department of Environmental Resources changed its name to the Pennsylvania Department of Environmental Protection in 1995. The two acronyms, PADER and PADEP, will be used interchangeably throughout this decision.

had recently filed a number of applications seeking a bond release. PADEP, as part of a litigation strategy, had decided to deny the bond release applications based on its hydrologic analysis. This course of action was chosen because, if Thompson chose to challenge PADEP's conclusions as to the source of the acid discharge, it would bear the burden of showing error in the conclusion that Thompson was responsible for abating the discharge.

See Respondent's Ex. 18. In fact, Thompson did challenge the denial of its bond release applications, a challenge which would eventually lead to a hearing before the Commonwealth of Pennsylvania Environmental Hearing Board (EHB). ^{4/}

While OSM officials were, at first, apparently willing to allow PADEP to pursue this litigation strategy (see Respondent's Ex. 18 at 3; I Tr. 225), they subsequently became dissatisfied with the length of time required to obtain a definitive ruling by EHB, particularly since, during EHB consideration, no ameliorative actions would occur with respect to MP #11. See I Tr. 226-27. Accordingly, by letter dated October 3, 1996, PADEP was informed by the HFO that, in OSM's opinion, PADEP's response to the November 7, 1994, TDN did not constitute appropriate action to cause the violation to be corrected (see 30 C.F.R. ' 842.11(b)(1)(ii)(B)) and, therefore, a Federal inspection of the site would be conducted. See Respondent's Ex. 17. PADEP subsequently sought informal review of this determination as provided by 30 C.F.R. ' 842.11(b)(1)(iii), challenging OSM's assertions that its response did not constitute appropriate action under the totality of the circumstances. By decision dated December 13, 1996, the OSM Regional Director affirmed the determination of the HFO that PADEP had failed to take appropriate action in response to the TDN. See Respondent's Ex. 19.

A Federal inspection of the site was conducted on January 24, 1997, resulting in the issuance of NOV's to both Thompson and Hamilton. When a subsequent inspection showed a continuation of the acid discharge problem, a failure to abate CO was issued. Thompson and Hamilton had sought review of the NOV's and, upon receipt of the CO, invoked the expedited review procedures delineated in 43 C.F.R. ' ' 4.1180 to 4.1187.

Pursuant to the expedited procedures, a hearing was conducted by Judge Torbett commencing on May 5, 1997. The presentation of testimony took 2 days. As indicated above, the testimony generally focussed on two separate issues.

First of all, there was conflicting testimony presented as to whether or not MP #11 was physically located within the limits of SMP 17810104.

^{4/} This challenge was ultimately rejected by the EHB in a decision styled Thompson Brothers Coal Company, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Protection, EHB Docket No. 96-028-R, issued September 15, 1998. This decision is discussed in some detail later in this opinion.

While it was undisputed that MP #11 was located north of township road T-805, whether or not the northern limits of the right-of-way constituted the southern boundaries of the permit was disputed on two different bases.

Thus, on the one hand, a question was raised whether the southern limit was properly delimited by the road or by the township boundary between Morris and Decatur townships. In support of appellants' contention that it was the township boundary which was to serve as the southern boundary of the permit, testimony was presented to show that the road and township lines diverged at the area in question. See I Tr. 241, 254-55. Alternatively, Thompson and Hamilton argued that, even if the permitting maps had intended to follow the road as the southern boundary, under applicable Pennsylvania rules (25 Pa. Code ' 86.37), the area immediately north of the road could not legally be within the permit area.

The second major source of conflict revolved around the question whether the acid discharge at MP #11 was hydrologically related to mining operations at the Morris No. 2 mine. While OSM submitted analyses concluding that the operations at the Morris No. 2 mine were hydrologically related to the continuing acid mine problem at MP #11 (see II Tr. 190-228; Respondent's Exs. 2, 12, and 14), Thompson and Hamilton presented evidence designed to show that, given the hydrogeology of the area, the acid discharge occurring at MP #11 could not be related to its mining activities under permit SMP 17810104. See generally II Tr. 13-30, 229-34; Appellants' Ex. 1.

Upon conclusion of the evidentiary presentation by both sides, Judge Torbett issued his oral ruling on May 7, 1997. As an initial matter, he held that, if the drainage is occurring from a seep located within the permit, it is irrelevant whether or not there is any relationship between mining under the permit and the seep. Judge Torbett held that, regardless of whether or not such a relationship existed, the lessee and operator would be liable. (III Tr. 50-51.) He then turned to the issue of whether MP #11 was, in fact, located within permit SMP 17810104.

On this issue, Judge Torbett concluded that MP #11 could not, consistent with the plain meaning of 25 Pa. Code ' 86.37, be included within the permit area since it was clearly within 100 feet of the township road. (III Tr. 51-53.) Additionally, he also relied on the testimony of PADEP inspector Owen Biesinger that the seep was not within the permit. (III Tr. 53-54.) And, finally, he also based his ruling on the fact that, if MP #11 were deemed to be within permit SMP 17810104, Thompson and Hamilton would have been in violation of the permit provisions from the date the permit issued. (III Tr. 54.)

Having concluded that MP #11 was off-permit, Judge Torbett then examined whether the evidence established that the acid drainage was hydrologically related to mining at the Morris No. 2 mine. Preparatory to his review of the conflicting expert evidence on this issue, Judge Torbett noted that, in his view, when the Government establishes that an individual is mining and that there is a violation located on the permit,

the burden falls on the mining company to establish that there is no violation. However, Judge Torbett contrasted the foregoing situation with that which obtains when the evidence establishes that a violation does exist but the situs of the violation is not within the permit. Judge Torbett ruled that, in this latter situation, the Government has the affirmative burden of establishing that the company is responsible for the violation. (III Tr. 54-55.) Thus, having already concluded that MP #11 was not within permit SMP 17810104, Judge Torbett assigned the burden of proving a hydrological connection between the acid seepage at MP #11 and the operations at the Morris No. 2 mine to the Government. (III Tr. 56.)

Turning to the expert testimony, Judge Torbett noted that "both have very plausible theories based on investigation" and that "quite frankly, either theory could be true." (III Tr. 57.) He expressly found that "the experts are at a standoff insofar as what is contained in their testimony. * * * I believe them both." (III Tr. 57-58.) Leaving aside the expert testimony, Judge Torbett opined that the record showed that the drainage had been occurring prior to mining at the Morris No. 2 mine and that the recharge for MP #11 was coming from an area on permit but not affected by mining. (III Tr. 58-59.)

Based on the above conclusions, Judge Torbett determined that Thompson and Hamilton were not liable for the acid discharge occurring at MP #11. After making this ruling, a colloquy transpired between Judge Torbett and counsel for OSM. Because of its importance to a procedural question discussed below, we set it out in relevant part:

JUDGE TORBETT: All right. Now, from the government. Precisely, I want you to be able to pin down everything I said. So if you don't agree with it you won't have to argue about what I said.

ATTORNEY BABCOCK: I think you are quite precise. I don't have any argument with what you said. I do have one question. Do you have a copy of the 43 CFR with you perhaps? I don't remember what the requirements for appeal in this case are whether I have to do it immediately.

JUDGE TORBETT: No, I think the appeal is the same as in any way.

ATTORNEY BABCOCK: No, it's different under an expedited process.

JUDGE TORBETT: I think it's only different ---

ATTORNEY BABCOCK: Maybe only if it's against the company.

JUDGE TORBETT: --- if it's against the government. If it's against the company, there are expedited things they have to do.

No, I take that back. I believe you do have to appeal this thing immediately if you want to appeal.

ATTORNEY BABCOCK: Well, let me register an appeal then. And if we decide not to after the fact, of course, I'll withdraw it.

JUDGE TORBETT: Right. I think you do well to put that on the record because I believe the way the regs are written, is the final decision for the Department has to be within 30 days and that includes the appeal time to the Board. You're quite right. You're quite right.

ATTORNEY BABCOCK: I believe I have 24 hours or something like that but I'll --- just to be safe.

JUDGE TORBETT: Well, you might as well put it on the record right now that you do intend to appeal it. That doesn't meet the requirements of the Board.

ATTORNEY BABCOCK: Right. That doesn't necessarily commit me.

JUDGE TORBETT: Right. This gives me notice. All right.

(III Tr. 61-63.) At this point, Judge Torbett adjourned the hearing.

Subsequently, however, a question arose as to the whether or not an appeal had properly been filed by OSM. Apparently, because of this uncertainty, Judge Torbett issued a written decision on July 29, 1997, confirming the oral decision he had rendered on May 7, 1997. OSM filed an appeal of this written decision on August 4, 1997.

[1] The first issue to be decided is whether or not OSM filed a proper appeal of Judge Torbett's oral decision. The applicable regulation, 43 C.F.R. ' 4.1187(f), provides in relevant part:

If any party desires to appeal to the Board, such party shall --

(1) If the administrative law judge makes an oral ruling, make an oral statement, within a time period as directed by the administrative law judge, that the decision is being appealed and request that the administrative law judge certify the record to the Board.

Thompson and Hamilton argue that OSM failed to unequivocally note its appeal and clearly failed to request Judge Torbett to certify the record to the Board. See Response in Opposition to OSM Motion for Extension of Time, at 1-4. OSM, for its part, argued that it did orally appeal at the hearing

and that its subsequent requests to have Judge Torbett certify the record went unheeded. 5/ See Motion for Extension of Time at 1-2; Brief of Appellant at 4.

We believe that a review of the record establishes that OSM did, in fact, file a timely notice of appeal. While it is certainly true that OSM indicated that there was a possibility that it might not ultimately pursue its appeal, its present intention at the time of the hearing to appeal was clearly expressed. 6/ It is equally clear, however, that nowhere in the record did counsel explicitly request Judge Torbett to certify the record to this Board. The question is whether this omission renders the appeal ineffective. We do not believe that it does.

While it cannot be gainsaid that the regulation provides that a party wishing to appeal must "request that the administrative law judge certify the record to the Board," we believe that where, as here, the record clearly discloses an intent to appeal, the expression of such an intent constitutes an implicit request to certify the record. Indeed, since the filing of a notice without a request for certification would be a feckless endeavor, it is difficult to imagine a situation where a party would expressly note an appeal without intending that the record be certified to the Board. Accordingly, we hold that, under the expedited review procedures, so long as the intention to appeal is clearly stated the request to certify the record will be presumed to have been made as a matter of law, absent an unequivocal statement to the contrary by the moving party.

[2] As indicated above, there are two disputed issues involved in this case. The first of these is whether or not MP #11 is located within the boundaries of SMP 17810104. Judge Torbett found that it was not within the mining permit for three separate reasons: (1) Since MP #11 was, without question, located within 100 feet of township road T-805 it could not, consistent with Pennsylvania law, be within the mining permit; (2) Owen Biesinger, a PADEP inspector, had testified that he did not believe MP #11 was within the permit; and (3) MP #11 could not have been within the permit since its inclusion would have put the permittee in violation of the terms of the permit since his permit's issuance. We will examine these justifications in reverse order.

To the extent that Judge Torbett based his conclusion that MP #11 was not within SMP 17810104 because its inclusion would have resulted in

5/ While the record provides no evidence of such subsequent requests to have the record certified, counsel for OSM avers that a number of such requests were orally made to Judge Torbett. See Brief of Appellant at 4.

6/ Thus, when OSM counsel declared "Well, let me register an appeal then. And if we decide not to after the fact, of course, I'll withdraw it" (III Tr. 62), OSM's desire to appeal was more than adequately expressed, regardless of the fact that the possibility remained open that, at some future date, OSM might decide not to continue with the appeal.

placing the permittee in immediate violation of applicable Federal and commonwealth regulations, we must reject his conclusion as mere supposition, unsupported by any evidence in the record. Certainly, it is unlikely that any permittee would intentionally include any acreage within a permit where the effect of such inclusion would be to render it responsible for corrective treatment of pre-existing acid mine drainage, unless either the permittee intended to mine the area or, alternatively, the permittee was unaware of the existence of the seep or failed to apprehend the consequences which inclusion of the seep in his permit might entail. The problem with Judge Torbett's analysis is that nothing in the record before him negated the alternative possibilities that the permittee was unaware of the existence of MP #11 when the permit issued or that the permittee failed to fully appreciate the consequences which might result from inclusion of MP #11 within the physical limits of the permit. ^{7/} Absent such showings, Judge Torbett's analysis lacks any evidentiary basis.

Insofar as Biesinger's testimony is concerned, our own analysis convinces us that it cannot be accorded any substantial evidentiary weight insofar as the question of the inclusion of MP #11 within SMP 17810104 is concerned. Biesinger's testimony was generally to the effect that, while he had originally believed that MP #11 was located within the permit area, he had subsequently come to the conclusion that it was outside the permit boundaries. (I Tr. 239-41, 254-58.) The basis for this conclusion was his expressed belief that the southern boundary of the permit was not township road T-805, but rather the township line between Morris and Decatur counties and that, at the point in question, the township line veered north of MP #11. The problems which we perceive with Biesinger's testimony are two-fold.

First, Biesinger provided no independent basis for his asserted conclusion that the township boundary was the intended southern boundary and proffered no explanation as to why an essentially invisible boundary would be selected in preference to one clearly delineated on the ground. Second, we note that while there seems no question that the township line does not exactly match the road bed of T-805, Appellants' Exhibit 8 clearly places the township line on the south boundary of the road bed as it passes south of MP #11. Such a location would place MP #11 within the permit area regardless of whether the permit boundary was the road or the township boundary. Biesinger's personal conclusion as to the locus of the southern boundary of the permit can thus be afforded no weight.

The primary basis of Judge Torbett's conclusion that MP #11 was not within SMP 17810104 was based on his interpretation of 25 Pa. Code ' 86.37.

^{7/} Moreover, while there was evidence that the coal in this area had been mined through the relevant seams (i.e., to the Lower Kittanning), this testimony was provided by Biesinger. See I Tr. 256. The real question, however, is not what is obvious now but whether or not the permittee was aware of these facts when the permit was issued.

Thus, he found that, under this provision, MP #11 could not legally be located within the permit. In relevant portion, that regulation provides:

No permit * * * application will be approved, unless the application affirmatively demonstrates and the Department finds * * * that all of the following exists:

* * * * *

(5) The proposed permit area is:

* * * * *

(iv) Not within one hundred (100') feet of the right-of-way line of any public road, except as provided for in Subchapter D.

25 Pa. Code ' 86.37.

PADEP officials had interpreted this provision as merely a reaffirmation of the prohibition against mining within a 100-foot buffer zone of a public road unless a waiver of the prohibition was obtained. In support of this interpretation, it was noted that, under Pennsylvania practice, numerous nonminable buffer zones were routinely included within a permit, and, indeed, must be within the permit for a waiver to be granted if one were desired. See II Tr. 141, 146-48. Judge Torbett, however, while recognizing that the actual practice of PADEP may have been otherwise, relied on what he deemed to be the plain meaning of the words used in the regulation and interpreted this provision as absolutely prohibiting the inclusion of any land in a permit which was within 100 feet of a public road unless a waiver of the prohibition against mining within 100 feet of a road was first obtained. Since no such waiver had ever been sought with respect to T-805, the 100 feet adjacent to the road (which included MP #11) could not be within SMP 17810104.

If the provisions of 25 Pa. Code ' 86.37 were found within the Code of Federal Regulations, it would be difficult to quarrel with Judge Torbett's analysis, absent some clear manifestation that the literal interpretation was not intended. See, e.g., Amoco Production Company v. Gambell, 480 U.S. 531, 548 (1987); Kenai Peninsula Borough v. Alaska, 612 F.2d 1210, 1213 (1980), aff'd sub nom. Watt v. Alaska, 451 U.S. 259 (1981); 3MRC-Co. Inc., 146 IBLA 6 (1998); Earl Williams, 140 IBLA 295, 303-304, 104 I.D. ____ (1997). However, 25 Pa. Code ' 86.37 is not a Federal regulation; rather it is a regulation adopted by the Commonwealth of Pennsylvania. And, as OSM has noted in a supplemental filing, the Commonwealth EHB has recently ruled on the precise question as to the proper interpretation of this provision in a decision styled Thompson Brothers Coal Company, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Protection, EHB Docket No. 96-028-R, issued September 15, 1998, affirming denial of bond release for Thompson and Hamilton.

In Thompson Brothers, the Pennsylvania Board, after first reviewing the conflicting interpretations advanced by the parties, declared:

It is within the power of [PADEP] to interpret its own regulations. The Department's interpretation is entitled to deference unless we find it to be clearly erroneous. Taking into account the language of the aforesaid regulations and the permitting process, we agree with the Department's interpretation of the regulations in question. [Emphasis added.] When issuing a permit for the surface mining of coal, it would not be practical or even feasible for the Department to carve out every location within the boundaries of the permit where mining is limited or prohibited. A much more reasonable approach is that practiced by the Department, whereby the permit covers the entire area within the permit borders, but certain sections within the permit -- such as the area within 100 feet of a roadway or stream or within 300 feet of a dwelling -- may not be physically disturbed unless certain conditions are met first.

That a barrier area is part of the permit is further reinforced by the manner in which the Department views a mine operator seeking to affect land within a barrier area. If a permittee wishes to affect land located inside a barrier area, it is not required to add acreage if the barrier area is within the physical boundary of the surface mining permit. When Thompson Brothers sought a variance to mine within 100 feet of another township road running through the Morris No. 2 mine site, it was not required to add additional acreage to its permit to mine this barrier area since it was already considered to be part of the permit.

Id. at 7-8 (citations omitted).

Faced with this unequivocal interpretation of the applicable Pennsylvania regulations, we are constrained to defer to the interpretation adopted by the EHB. ^{8/} This is consistent with a long line of our decisions which have held that, where the proper interpretation of state statutes or regulations is at issue, the Board will defer to the interpretation adopted by the state officials or agencies who are charged with the administration of the program involved, in the absence of any contrary State court decisions adjudicating the question. See, e.g., Exxon Company, U.S.A., 118 IBLA 30, 32-34 (1991); C & K Petroleum, Inc., 27 IBLA 15, 18 (1976); Ocean Drilling & Exploration Co., 21 IBLA 137, 141 (1975); Beverly Harrell, 12 IBLA 276, 277 (1973).

^{8/} Further, we note that this interpretation of the Pennsylvania regulations has at least been implicitly recognized by Pennsylvania courts.

Thus, in a decision styled Al Hamilton Contracting Company v. Department of Environmental Resources, 659 A.2d 31 (Pa. Commw. Ct. 1995), the Court observed that "[t]he mine site has Township Road 605 as its northern boundary." Id. at 33.

In light of the fact that we have rejected Judge Torbett's other bases for his conclusion that MP #11 was not located within SMP 17810104, and in view of EHB's clear holding that 25 Pa. Code ' 86.37 does not bar inclusion of barrier areas adjacent to public roads within surface mining permits, we must reverse Judge Torbett's determination on this issue. Accordingly, we expressly hold that MP #11 is located within the physical and legal limits of Thompson's permit.

[3] OSM argues that, under the provisions of section 315(a) of the Commonwealth of Pennsylvania's Clean Streams Law (35 Pa. Cons. Stat. ' 691.315(a) (1998)), once it is established that MP #11 is located within SMP 17810104, the issue of whether or not the operations at the Morris No. 2 mine have been a causative factor in creating or exacerbating the acid discharge becomes irrelevant. Thompson and Hamilton, for their part, argue that the issue of causation is still relevant under Pennsylvania law even if it is determined that MP #11 is on the permit. On this question, however, we believe that OSM is clearly correct.

In North Cambria Fuel Company v. Department of Environmental Resources, 621 A.2d 1155 (1993), the Commonwealth Court of Pennsylvania, relying on the Pennsylvania Supreme Court decision in Commonwealth v. Harmar Coal Company, 306 A.2d 308 (1973), expressly held that, under section 315(a) of the Clean Streams Law, "neither fault nor causation is necessary to impose liability." Id. at 1159. After quoting from the Harmar decision and a subsequent decision of the Commonwealth Court rendered in Thompson & Phillips Clay Company v. Department of Environmental Resources, the North Cambria Court continued, "[i]f a discharge occurs from a mine operator's property, that is all that is needed to impose liability." Id. at 1160. The North Cambria decision was subsequently affirmed by the Pennsylvania Supreme Court, in a per curiam order reported at 648 A.2d 775 (1994).

The cases on which Thompson and Hamilton rely ^{9/} are easily distinguished both from North Cambria and the instant appeal, since those cases arose not under section 315(a), but rather under section 316 (35 Pa. Cons. Stat. ' 691.316 (1998)), which deals with the liability of occupants and landowners, not those actively engaged in mining under permits issued by the Commonwealth of Pennsylvania. In North Cambria, the Court reviewed those same cases and expressly distinguished the causation requirements found to exist under section 316 from the absolute liability imposed on mining permittees by section 315. See North Cambria Fuel Company v. Department of Environmental Resources, supra at 1161-62.

^{9/} Thus, the decisions in National Wood Preservers, Inc. v. Department of Environmental Resources, 414 A.2d 37 (Pa. 1980), Al Hamilton Contracting Company v. Department of Environmental Resources, supra, and A.H. Grove & Sons v. Department of Environmental Resources, 452 A.2d 586 (Pa. Commw. Ct. 1982), all arose under section 316 of the Clean Stream Law.

Inasmuch as we have reversed Judge Torbett's conclusion that the situs of the acid discharge (MP #11) was not within SMP 17810104, it must follow that his actions vacating the NOV and CO cannot stand. We accordingly reverse Judge Torbett's decision vacating the NOV and CO and affirm their issuance. Since the foregoing is dispositive of the instant appeal, we do not reach the alternative ground for reversal (that Judge Torbett erred in his finding that operations at the Morris No. 2 mine were not related to the acid mine discharge at MP #11) pressed by OSM.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. ' 4.1, the decision appealed from is reversed.

James L. Burski
Administrative Judge

I concur:

James P. Terry
Administrative Judge